Supreme Court, U.S.
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No. 90-1388

In The

Supreme Court of the United States

October Term, 1990

PAMELA S. DEMPSEY, SUE TERRY, and NANCY J. PENDERGRAFT,

Petitioners,

v.

HARRY A. BENDIBURG, INDIVIDUALLY, AND AS THE ADMINISTRATOR OF THE ESTATE OF CARL BENDIBURG, DECEASED,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State official's immunity from trial and monetary liability under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny may be defeated by a trial court's refusal to decide the official's entitlement to immunity on summary judgment because the court thought disputed issues of fact created a jury question?

2. Whether, in light of *Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100 (1990), a procedural due process claim is stated when a caseworker, who reasonably believes a medical emergency exists, but lacks "uncircumscribed power" to change parental custody herself, obtains an *ex parte* court order to remove a child from the parent's custody so the child may receive medically recommended treatment?

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Respondent Harry A. Bendiburg, individually and as administrator of the Estate of Carl Bendiburg, deceased, hereby opposes the petition for certiorari filed by Petitioners.

STATEMENT

On September 15, 1985, the Respondent's 15-year-old son, Carl Bendiburg, was injured in an automobile collision that also claimed the life of the Respondent's wife. Carl was hospitalized until November 9, 1985, when he was discharged home to continue intravenous therapy for an infection. Shortly after Carl returned home, a conflict arose between the Respondent and the private home-care nurses concerning the administering of Carl's intravenous antibiotics.

Because of difficulties encountered by the home-care nurses in administering the antibiotics, they pressured the Respondent to allow the insertion of a Hickman catheter to facilitate the administering of the antibiotics. A Hickman catheter is a long silicone rubber catheter which is inserted into either the subclavian (collarbone) or jugular (neck) vein and then threaded through the patient's upper venous system to the juncture of the superior vena cava and the right atrium of the patient's heart. The first few inches of the exterior end of the catheter are buried under the subcutaneous level of the chest so that the end of the catheter actually protrudes from the chest wall near the nipple. Fluids, including antibiotics, can then be easily administered to the patient through the end attached to the chest wall.

The Hickman catheter is not a simple, no-risk procedure. The risks of the procedure include the puncture of a lung or vein, sepsis (infection), thrombosis, aortic injury, embolization, and death. Complication rates have been known to be as high as 88%. Because of the risks associated with the use of such catheters, the Respondent

refused to allow one to be inserted into Carl. His refusal frustrated and angered the home-care nurses, particularly defendant Harrison, their supervisor.

While the Petitioners assert in their Petition that Carl's condition was deteriorating while at home (Pet., p. 3), this is untrue. The specialist in charge of Carl's antibiotic treatment, Dr. Weinberg, saw Carl in his office on November 20. At that time, Dr. Weinberg determined that Carl "was improving with continued antibiotics" and asked Carl to return for a follow-up in two weeks.

On Wednesday afternoon, November 27, the day before Thanksgiving, Carl had an appointment with his orthopedic surgeon, defendant Cohen. Cohen had not seen Carl for three weeks, had not conferred with Dr. Weinberg with respect to Carl's present condition, and was dependent solely upon Harrison for his information concerning Carl. Shortly before noon on the 27th, before Carl had even arrived in his office, Cohen directed Harrison to contact DFACS so that the Hickman catheter could be implanted.

Harrison immediately telephoned DFACS and spoke with Petitioner Dempsey. Harrison and Cohen both were complete strangers to Dempsey. She had never dealt with either one of them before, and she was also totally ignorant of the Bendiburg family and its circumstances.

What was said between Harrison and Dempsey during the telephone call is sharply disputed. While Dempsey testified that she was told this was in essence a "life or death" situation, Harrison denies this. *See*, Pet. App. "C", pp. 60a-62a. According to Harrison, the most she said was that Cohen thought the Hickman catheter

was an "important procedure" for Carl, and that if Carl "did not receive the antibiotics on a regular basis, . . . he had a very poor chance of not losing his leg and may die." Harrison did not tell Dempsey that he could lose his leg or die if the procedure was not done immediately. *Ibid.* Nevertheless, while Harrison waited on the telephone, Dempsey conferred with Petitioner Terry, the second-ranking officer of the agency, and obtained Terry's approval for obtaining an *ex parte* order taking custody of Carl from his father so the Hickman catheter could be implanted on Thanksgiving day.

Shortly thereafter, Dempsey obtained such an order[1] and admitted Carl to the hospital so the procedure could be performed the next morning. Prior to obtaining the *ex parte* order, Dempsey made no effort to contact Carl's father or anyone else and conducted no investigation of Carl, his family, his condition, or the risks of the surgical procedure she had been asked to approve. When the *ex parte* order was obtained, a hearing was scheduled for the next regular day of court, Monday, December 2. The Respondent learned what was happening only when Carl telephoned him from the hospital after he was admitted. Even though the Petitioners suggest that Dempsey initiated this call (Pet., p. 5), that was not the case. Had the Respondent not demanded that Carl put the caseworker on the telephone, Dempsey would have completed the

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[1] The juvenile court had never before refused Dempsey's request for an *ex parte* order. Dempsey could remember the juvenile court refusing only one such request from other DFACS caseworkers, on an occasion when the court clearly did not have jurisdiction of the child then in question.

entire custody-deprivation process without ever talking to the child's parent.

The surgeon who implanted the catheter, defendant Shadeed, acknowledged that no emergency existed with respect to Carl's case. Cohen himself never characterized this as an emergency situation. *See, e.g.*, Pet. App. "E". He denies ever telling Dempsey that the Hickman catheter had to be implanted immediately. Rather, he testified that, "I think I implied an urgency that it needed to be done fairly quickly."

At the hearing on December 2, custody of Carl was returned to his father. According to Dempsey, the sole purpose of taking Carl from his father was to get the catheter implanted, and it was the plan from the beginning that Carl would be returned to his father at the hearing since there was no basis for a deprivation petition other than the father's refusal to approve the Hickman catheter. Thus, there was nothing for the Respondent to contest at the hearing inasmuch as the State was voluntarily returning his son to him.

Carl died on December 14, 1985. The autopsy report makes clear that Carl's death was in fact caused by the Hickman catheter.

The Petitioners assert that the Respondent is not challenging the constitutionality of DFACS' policy. Pet., pp. 4, 16. This is a misstatement of the Respondent's position. The Respondent has alleged,[2] and the District

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[2] "The damages suffered by the Plaintiff was proximately caused by policies and/or customs of the [DFACS Defendants], including, *inter alia*, a policy of depriving parents of their parental rights without due proces of law." Complaint, ¶37.

Court found, that DFACS had a policy "of depriving parents of their parental rights in the custody of their children without notice." Pet. App. "C", p. 66a. More specifically, the policy was to obtain an *ex parte* order taking custody of a child from his parents anytime DFACS wanted to intervene, regardless of whether there in fact existed a bona fide emergency warranting *ex parte* action. As both Dempsey and Pendergraft testified, DFACS simply did not notify the parents and the parents were not afforded a hearing under any circumstances.

REASONS FOR DENYING THE WRIT

I. The first issue argued by the Petitioners does not warrant review by this Court for two reasons: first, the Petitioners did not raise the issue in the District Court or the Court of Appeals, and second, the issue argued is not even presented by this case.

1. The first issue which the Petitioners seek this Court to hear is whether, on a state official's motion for summary judgment on the ground of qualified immunity, "the judge should resolve all issues, both legal and factual, or whether disputed questions of fact must be decided by the jury." Pet., p. 7. The Petitioners raised this issue for the first time in their petition to this Court. It was not raised in the Court of Appeals, either in the main appeals or in the petitions for rehearing and for rehearing en banc.

This Court's normal practice "is to refrain from addressing issues not raised in the Court of Appeals." *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19,

24 (1986). *See also, FTC v. Grolier, Inc.*, 462 U.S. 19, 23, n.6 (1983); *Rogers v. Lodge*, 458 U.S. 613, 628, n. 10 (1982); *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984). No compelling reason exists for departing from that practice in the instant case, particularly since the issue argued is not even presented by this case.

2. By carefully constructing their argument, the Petitioners make it appear as if the Court of Appeals held that questions of fact pertaining to the qualified immunity defense must be presented to a jury, rather than decided by the trial judge. *See, e.g.*, Pet., p. 9. The Court of Appeals did not so hold. Rather, it stated:

> The basic and complex legal issues will be more fully informed after the district court is able to view the evidence produced at trial, and after the court has made findings of fact or a properly instructed jury has resolved the critical factual issues.

Pet. App. "A", p. 11a.

The language of the Court of Appeals' opinion clearly anticipates that the District Court will decide the issues properly reserved unto it, i.e., qualified immunity, and the jury will decide the issues properly the province of the jury, i.e., due process, conspiracy and battery. This is not inconsistent with any of the cases cited by the Petitioners. *See, Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988); *Hughes v. Meyer*, 880 F.2d 967 (7th Cir. 1989); and *Radovich v. Wade*, 850 F.2d 1180 (7th Cir. 1988). Indeed, in *Jones* the court approved of a procedure whereby the district court submitted the issue of probable cause to the jury and then after the jury had returned its verdict, made its own decision on immunity. 856 F.2d p.

994. Whether the District Court will chose to follow such a procedure here is unknown, but it is clear that the Court of Appeals did not direct the District Court to submit the qualified immunity question to a jury.

To the extent the Petitioners argue that the qualified immunity defense must be conclusively and finally determined at the summary judgment stage, they are at odds with the authorities upon which they rely. For example, in *Fludd v. United States Secret Service*, 771 F.2d 549 (D.C. Cir. 1985), the court held that when a trial court is deciding the issue of qualified immunity on a motion for summary judgment, " . . . if, considering the undisputed facts and/or the disputed facts in the light most favorable to [the plaintiff], it cannot find, as a matter of law, that defendants violated no clearly established constitutional right of the plaintiff, summary judgment on the issue of qualified immunity is inappropriate, and the parties should be afforded the opportunity to establish the factual predicates for their contentions by discovery and trial." 771 F.2d p. 554.

Here the District Court and the Court of Appeals merely decided that there are disputed facts and that the question of qualified immunity cannot be decided without a plenary trial. The issue which the Petitioners seek to raise, and which they contend represents a split in the circuits, simply does not exist in this case.

II. The second issue raised by the Petitioners in their Petition, the Court of Appeals' alleged misapplication of the "*Parratt/Hudson* doctrine," also does not

warrant review by this Court for several reasons.[3] First, the basic premise of the Petitioners' argument on this point, that *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), is inapplicable because the Respondent is not challenging the constitutionality of DFACS' policy, is simply in error. The Petitioners admit they have a policy of not giving notice to parents before taking custody of their children, Pet., p. 4, and the Respondent has clearly attacked the constitutionality of that policy.[4] To the extent the Petitioners are contending that DFACS has no such unconstitutional policy, then the existence *vel non* of that policy becomes just another fact issue which must be resolved upon a plenary trial.

Second, *Parratt/Hudson* are inapplicable because the deprivation here was not random and unpredictable. It occurred as the result of an admitted policy of DFACS to deny notice and a hearing to parents. The state could precisely predict when the deprivation would occur,

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[3] The Petitioners couch this issue in terms of a caseworker "who reasonably believes a medical emergency exists." However, what Dempsey reasonably believed is one of the questions of fact the District Court and the Court of Appeals determined had to be resolved at a plenary trial.

[4] Petitioners correctly state that the Respondent is not attacking the constitutionality of the Georgia Juvenile Court Code. However, Petitioners incorrectly state that they followed that statute in taking Carl from his father. There are numerous discrepancies between the Juvenile Court Code and the procedure followed by Petitioners in the instant case. *See* Respondent's Brief in Court of Appeals (Docket No. 89-8742), pp. 32-34.

which was at the time of the taking of the child. Moreover, the Petitioners testified that DFACS routinely took children from their parents pursuant to that policy.[5]

Third, *Parratt/Hudson* do not apply because predeprivation process was clearly possible here. The juvenile court judge testified that he or a member of his staff were present 24 hours a day, including holidays, to hold hearings on such issues if requested. Thus, even had there been a medical emergency, a hearing would still have been possible. Here, the hearing date was specifically

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[5] Dempsey testified:

> Q. What I'm trying to get at, Ms. Dempsey, is tell me if there is any reason why you could not have called [plaintiff] before you went to Juvenile Court other than you were in a hurry?
>
> A. If it had been common practice for us to contact the parent before doing an ex parte order, I'm sure I would have done that. But, like I say, I don't remember a time I've ever contacted a parent before going to court.
>
> Q. Did any of your supervisors ever advise you against contacting the parents?
>
> A. Yeah, in many instances.

Dempsey Deposition, pp. 149-50. Pendergraft, Dempsey's supervisor, testified:

> A. We did not contact the parent until after it was done, period. I mean, we just didn't.
>
> Q. Why?
>
> A. That was just the way we proceeded.

Pendergraft Deposition, p. 120.

chosen not to provide due process, but to prevent the parent from being heard until after the deprivation *and* the surgery were *fait accompli*.

Lastly, *Parratt/Hudson* do not apply here because the deprivation was authorized, both by the official policy of DFACS and by the second most senior official of that agency. The Petitioners' narrow reading of *Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 118 (1990), that a deprivation is "authorized" only when it results from "broadly delegated, uncircumscribed power," is unfounded and inconsistent with the Court's holdings in *Parratt* and *Hudson*. The deprivation here was not caused by an "unauthorized departure from established practices," *id.*, n. 20, as in *Parratt* and *Hudson*. To the contrary, it was caused by the implementation of DFACS' policy by state officials clothed with the discretionary authority to effectuate such takings on behalf of the state.[6]

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[6] *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), is not applicable here because this action involves not passive conduct on the part of the state, but affirmative action whereby a child was actually seized by the state and injured as the result of the state's unconstitutional policy and deliberate indifference.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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